

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 345 of 1985

WITH CRIMINAL APPEAL NO.346 of 1985

AND CRIMINAL APPEAL NO. 29 OF 1985

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE R.R.JAIN

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

STATE OF GUJARAT

Versus

IQBAL ALTAFHUESEIN G MALEK

Appearance:

CRIMINAL APPEAL NO. 345/85

MR S.R. DIVETIA, ADDL. PUBLIC PROSECUTOR FOR THE
APPELLANT

MR KJ SHETHNA for Respondent No. 1

Appeal abate against respondent No.2

MR JM PANCHAL for Respondent No. 3 to 5

CRIMINAL APPEAL NO. 346/85

MR S.R. DIVETIA, ADDL. PUBLIC PROSECUTOR FOR THE
APPELLANT.

Appeal abates against respondent No.1

MR J.M. PANCHAL, Advocate for the respondent No.2

CRIMINAL APPEAL NO.29/85

MR K.J. SHETHNA, Advocate for the appellants.

MR S.R. DIVETIA, ADDL. PUBLIC PROSECUTOR FOR RESPONDENT

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE R.R.JAIN

Date of decision: 07/11/96

ORAL JUDGEMENT (Per R.K.Abichandani,J.)

All these appeals arise from the same decision of the Additional Sessions Judge, Kheda at Nadiad in Sessions Case No. 122 of 1984 and have been heard together and are being disposed of by this common judgement.

2. Criminal Appeal No. 345/85 filed by the State is directed against the acquittal of all the four accused persons for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. The other State Appeal No. 346/85 is filed against the acquittal of the accused Nos. 2 and 4 for the offence under Section 326 of the IPC. Criminal Appeal No. 29/85 is filed by the accused No.1 and accused No.3 who were convicted for the offence punishable under Section 326 of the IPC.

3. The prosecution case was that there was a tenancy litigation between the accused No.2 - Fatemiya Yasinmiya Pathan and the deceased Nanumiya Dasotmiya and therefore, the relations between the two sides were strained. Nanumiya Dasotmiya and his brothers were staying in the outskirts of village Finav while the accused persons were residents of the nearby village Mahudha. According to the prosecution, on 17.5.1984 around 3.30 P.M, the accused Nos. 1, 2 and 3 each armed with Dharia and the accused No.4 with a stick were waiting for Nanumiya Dasotmiya to pass from the place of the offence, which is near the 'Chotra' located in the outskirts of Finav, and, when Nanumiya Dasotmiya came there on his horse, all these accused forced him to get down and attacked him with their weapons inflicting serious injuries on him as a result of which he died on the same day around 8.15 PM. According to the the prosecution, all these accused persons fled away from the scene of the offence after injuring Nanumiya Dasotmiya, but Nanumiya who had fallen down due to the assault was in his senses and he immediately disclosed the names of all these four persons as the assailants. The prosecution case is that Nabimiya the eldest brother of Nanumiya and their other brother Hasammiya had witnessed the incident. Kasammiya who is also their brother had arrived just after the incident

and he had asked from Nanumiya about the assailants. On coming to know their names, he filed the complaint after reaching Mahudha. The injured Nanumiya was taken by his brothers to Mahudha in a hand-cart, which was brought from the village to the scene of the offence. For going to Mahudha, they had to pass through their own residence in the outskirts of Finav and on reaching Mahudha, the injured was admitted in the hospital under a Police yadi. In Mahudha itself there is a Police Station where the FIR was lodged by Kasammiya. The Investigating Officer, after the FIR was lodged, proceeded to the hospital and recorded the statement of Nanumiya who, according to the medical evidence, was conscious and in his senses. The statement of Nanumiya was recorded in which he disclosed the names of all these four assailants. Initially the offence was registered under Section 307 of the IPC, but later on when Mahudha dispensary could not treat the injured Nanumiya because of his multiple injuries and he was sent to the Civil Hospital at Ahmedabad, he passed away within a few minutes after reaching the Civil Hospital, the offence under Section 302 read with Section 34 of the IPC was registered against all these accused persons.

4. All the accused were charged and tried for the offence punishable under Section 302, read with Section 34 of the IPC. The accused Nos. 1, 2 and 3 were also individually charged for the offence punishable under Section 326 of the IPC and the accused No.4 for the offence under Section 323 of the IPC.

5. The accused pleaded not guilty to the charges. They gave a written defence Ex.59 in which it was alleged that the accused No.2 - Fatemiya Yasinmiya Pathan had succeeded in the Revenue Tribunal in the appeal filed by him against Nanumiya Dasotmiya and his brothers in respect of the land bearing survey No. 781/1-B of village Bhumat, as a result of which the complainant, the deceased and their brothers had falsely implicated them. The defence version further says that the accused No.1 was falsely implicated because his name is Altafhusein Gulam Mohammed Malek and not Iqbal. It was stated that the accused No.1 has two brothers namely - Mustufa and Iqbal and that Iqbal was an agriculturist residing in Mahudha and that the accused was producing necessary documents in that regard. It may be noted that when the list of original documents was produced no original document was placed on record for showing that there was some other person named Iqbal who is brother of the accused No.1. The prosecution version is that accused

No.1 Iqbal and Altafhusein Gulamhusein Malek are one and the same person and that though in his service record his name was shown as Altaf, he is widely known as Iqbal. The defence version further is that the accused No.4 was also falsely implicated and that his real name was Gulamnabi Mohammed and not Gulam Husein. Though this defence is raised in the written defence Ex.59, not a single prosecution witness was confronted with this aspect and there is no suggestion made to any of them in the cross-examination on behalf of the accused No.4 that he was a different person having a different name. The further defence version was that the accused No.3 was related to the accused No.2 on his 'in-laws' side and therefore, he was falsely implicated. The accused No.2 Fatemiya Yasinmiya Pathan also put up an alibi as his defence, contending that on the date of incident he was working as a driver in the Mahudha S.T. Depot and that he did not know anything about the incident.

6. At the outset it may be noted that as pointed out by the learned Counsel appearing for the accused No.2 Fatemiya Yasinmiya Pathan, Fatemiya has unfortunately passed away during the pendency of these appeals on 21st September, 1994. A death certificate is produced on the record of these appeals, which shows that Fatemiya, son of Yashimkhan Pathan of village Mahudha, passed away on 21st September, 1994. The learned Additional Public Prosecutor was asked to verify this fact and he also states that the accused No.2 - Fatemiya has passed away. The State appeals which are filed against the said accused No.2 Fatemiya therefore, abate.

7. The trial Court held that the death of Nanumiya was homicidal. It was however, held that the prosecution failed to prove that the accused had a common intention of murdering Nanumiya and in furtherance of that common intention the accused had given fatal blows with Dharias and stick with the intention of causing his death or such bodily injury as was sufficient in the ordinary course of nature to cause death. He therefore, acquitted all of them for the offence under Section 302 read with Section 34 of the IPC. The learned Addl. Sessions Judge found that the prosecution had proved that the accused Nos. 1 and 3 had caused grievous hurt to Nanumiya and had individually committed the offence punishable under Section 326 of the IPC. It was held that the charge of the offence under Section 326 of the IPC was not proved against accused Nos. 2 and 4. It was also held that the prosecution did not prove beyond reasonable doubt that the accused No.4 committed an offence punishable under

Section 323 of the IPC. In the process of his reasoning, the learned Additional Sessions Judge observed that none of the injuries which were inflicted by Dharja on Nanumiya was on a vital organ and therefore, the accused cannot be attributed any intention to inflict injury which may in the ordinary course of nature, cause death. As regards the assault by stick, the learned Additional Sessions Judge observed that Nanumiya did not disclose assault by a stick while giving history to the doctor. The learned Additional Sessions Judge further observed that the injuries were not sufficient in the ordinary course of nature to cause death because the doctor had not noticed any damage to the arteries. It was observed that the evidence of Dr.Shah who had examined the patient when he was admitted in the Civil Hospital at Ahmedabad leads to an inference that murder or culpable homicide not amounting to murder was beyond consideration of the case looking to the injuries which were inflicted on Nanumiya. Injuries Nos. 1 and 4 enumerated in the Post-mortem notes which were noticed by the doctor who had carried out the Post-mortem examination were ignored by the learned Additional Sessions Judge on the ground that they were not noticed by the previous two doctors. It was held on the basis of the medical evidence that the death of Nanumiya may be homicidal one, but, the offence that was committed, was only one under Section 326 of the IPC. As regards the aspect of common intention, the trial Court held that there was no evidence of prior concert between the accused and mere presence of the accused at the scene of the offence with arms did not necessarily mean that they were entertaining the same intention. It was also held that the dispute regarding land was between accused No.2 - Fatemiya and the deceased Nanumiya and therefore, there was no question of the other accused persons sharing any common intention with Fatemiya. As regards the accused No.2 - Fatemiya, it was stated that on the day of the incident, he was reported to be on duty and the alibi plea of the accused No.2 was supported by witness Abdulmiya, who was a Traffic Inspector in the S.T Depot, Mahudha. It was held that in view of this plea of alibi coupled with the circumstances that the relations between the accused No.2 - Fatemiya and deceased Nanumiya alone were estranged, the other accused persons should be given benefit of doubt. As regards the accused No.4, it was stated that the stick injury which was caused to Nanumiya, which was attributed to the accused No.4 was not supported by medical evidence and therefore the guilt of the accused No.4 was not established.

8. As regards the plea of the accused No.1 that

there was some other person named Iqbal, who was his brother and who was named by the prosecution witnesses and that he himself was not involved, the trial Court after scrutiny of the evidence on record found that there was no substance in this plea and that Iqbal was the name of the accused No.1. The trial Court noted that even in his own bail application the accused No.1 had given his name as Iqbal alias Altaf and no contention was taken up during the hearing of that application that the accused No.1 was not Iqbal. Even in the bail bond his name was mentioned by him as Iqbal Altafhusein. It was also noted that the prosecution witnesses had identified the accused No.1 and had stated that he was widely known as Iqbal. The trial Court came to the conclusion that the accused Nos. 1 and 3 had inflicted Dharia blows on Nanumiya and accepting the testimony of the eye witnesses as also the other evidence on record including the dying declaration, the trial Court convicted the accused Nos. 1 and 3 for the offence under Section 326 of the IPC sentencing each of them to undergo rigorous imprisonment for a period of 3 years and to pay fine of Rs. 1,000/-.

9. The learned Additional Public Prosecutor contended that the trial Court has erroneously acquitted all these persons for the offence under Section 302, read with Section 34 of the Indian Penal Code. He submitted that the account given by the eye witnesses - Nabimiya and Hasammiya of the incident clearly proved that all the four accused who were known to the witnesses had assaulted Nanumiya around 3.30P.M on 17.4.1985 with Dharias and stick. It was submitted that the part played by the accused Nos. 1, 2 and 3 with their Dharias and by the accused No.4 with the stick was reflected at the earliest point of time by the oral dying declarations of Nanumiya made to his brother Kasammiya and his other brother Mir Saba and also to his wife Saidabibi and in his dying declaration recorded in presence of the doctor as also made to the panchas in the panchnama which was drawn of his condition, while he was in the hospital at Mahudha. The learned Public Prosecutor further submitted that the alibi of accused No.2 Fatemiya was not at all proved. It was established from the duty sheet Ex.50, as also from the oral evidence that the accused No.2 had not worked after 12.35 noon when he was relieved from his duty after having done the trip from 6.00AM. It was submitted that the duty sheet shows that the total number of hours of duty were mentioned for each day and whenever the accused had put in duty for longer hours, it was so mentioned against those dates. On the date of the incident he had remained on duty only between 6.00 A.M to 12.35 P.M. Therefore, at the time of the incident around

3.30 P.M, there was no question of the accused No.2 having remained on duty. It was submitted that the trial Court has over-looked this aspect of the matter and wrongly held that the accused No.2 was not there. He submitted that the fact that the accused No.2 was present at the relevant time and took part in the crime, is required to be taken into account as it would have a bearing on the aspect of common intention of all the accused persons. It was further contended that the reasoning of the trial Court that there was no injury corresponding to the stick blow noted by the previous two doctors and therefore, the participation of the accused No.4 in the crime was doubtful, is an erroneous reasoning since in the panchnama Ex.44 of the condition of the injured Nanumiya drawn at Mahudha hospital, all the six injuries were noted and they included a contusion which could have been caused by a stick blow. The learned Public Prosecutor submitted that all the accused came together at the scene of the offence armed with weapons, they forced Nanumiya to get down from the horse and inflicted severe injuries by sharp cutting weapons namely Dharias as a result of which he died later in the hospital. It was submitted that because the Dharia blows were given on the arms and legs, it cannot be said that there was no intention to cause injuries which were likely to cause death. It was submitted that the cuts which were caused because of Dharia were bone deep and severe cuts on both arms and leg which nearly amputated the leg were sufficient in the ordinary course of nature to cause death as was opined by Dr. Modi who carried out the post mortem examination. The learned Public Prosecutor also submitted that all the accused persons having completed that task, had gone away from the scene of the offence.

10. It was also submitted that there was a suggestion by the defence to one of the witnesses that earlier on the day of the incident there was a quarrel between Nanumiya and brother of the accused No.1 in respect of theft of mangoes from the field. He therefore, submitted that the offence under Section 302 read with Section 34 of the IPC was clearly made out against these accused persons.

11. The learned Counsel Mr. Panchal, appeared for all the accused persons in the State acquittal appeal. Mr. K.J. Shethna, who also appeared in the appeal filed by the accused Nos. 1 and 3, on their behalf supported the contentions raised by Mr. Panchal and also made further submissions.

12. It was contended on behalf of the accused persons that the complainant Kasammiya was not a reliable witness. It was submitted that all the main witnesses were close relations. Kasammiya, Nabimiya and Hasammiya were all brothers. Therefore in absence of corroboration from independent source, no reliance could be placed on their evidence. It was also submitted that Kasammiya and Nabimiya were chance witnesses and there were material contradiction in the deposition of all the three brothers. It was further submitted that the investigation was not fair and honest and the dying declaration Ex.52 could not be relied upon, inasmuch as, it was recorded by the Police Officer after he had commenced the investigation and was only intended to be a statement during investigation, which was in fact under the law, not required to be signed by Nanumiya. It was submitted that the dying declaration was not in question - answer form, nor was the time mentioned therein. Moreover, the brothers of Nanumiya were present at that time and there was possibility of it being a tutored dying declaration. It was also contended that the dying declaration was bearing a thumb impression which was not identified. It was also argued that Nanumiya with serious injuries on his hands could not have himself put this thumb mark on the dying declaration. It was also submitted that in the dying declaration Ex.52 it was stated by Nanumiya that all the accused were having Dharias and later on it was stated that the accused No.4 had given a stick blow to him. It was further submitted that the dying declaration before the panchas in the panchnama Ex.44 was hit by the provisions of Section 162 of the Criminal Procedure Code and cannot be read in evidence. It was also contended that there was no mention of the eye witnesses in the FIR and the Bheel lady referred to in the FIR was not examined. It was submitted that the prosecution has deliberately not examined the Bheel woman and her husband, who admittedly were near the scene of the offence. It was also submitted that there was no evidence regarding prior concert and that there was nothing to show that the accused knew that the deceased was to come at the place of the incident. It was also argued that the manner of assault deposed by the witnesses was doubtful because the assailant would not have allowed Nanumiya to get down from the horse and they would have attacked him and torn him to pieces while he was on the horse. It was also submitted that there was no motive on the part of the accused persons to assault Nanumiya because the accused No.2 had already succeeded in the tenancy appeal.

13. The fact that Nanumiya was assaulted on 17.5.1984

at the place of the incident near the outskirts of village Finav around 3.30 P.M is clearly borne out from the record and cannot be disputed. After the incident, Nanumiya was taken to the Mahudha Primary Health Centre and there, he was examined by Dr. Ashok Babulal Sharma P.W 2 at about 4.30 P.M. Dr.Sharma issued certificate of injuries Ex.17 in which he had noted the following injuries:-

1. An incised wound on middle of lateral surface of rt. fore arm - 3" x 1" x bone deep. Fracture of right humerus present.
2. An incised wound on upper part of antero medial surface of left forearm 1" below medial epicondyle of left humerus - 2" x 1/2" x 1'4" vertical.
3. An incised wound on middle of ant. surface of left forearm - 7" x 4" x 1" obliquely downward to medial.
4. An incised wound on ant. surface of right knee joint - 6" x 3" x bone deep, transverse.

He had noted that the injuries Nos. 1, 2 and 4 were grievous and the injury No.3 was simple. It was also mentioned that these injuries could have been caused by sharp cutting instrument. He noted that period of recovery cannot be predicted and he referred the patient to the Civil Hospital, Ahmedabad. Dr. Sharma has in his deposition Ex.16 stated that the patient was brought in a hand-cart to the hospital by his relatives and that he was in a fit condition to give statement. He has stated that the statement of Nanumiya which was shown to him, was recorded in his presence and that he had endorsed the same in his own hand. That statement is Ex.52 which contains the dying declaration of Nanumiya. After being referred to the Civil Hospital, Ahmedabad, Nanumiya was taken there at about 7.35P.M and treated by Dr. D.A.Patel. However, Nanumiya passed away at 8.50 P.M.

14. Dr. Kamlesh Shantilal Shah from the Civil Hospital, Ahmedabad refers to the injuries which were noticed by him while he was working under Dr. D.A.Patel, after the patient was admitted in the hospital at 8.00PM. The certificate of injuries given by him is at Ex.19. He had examined Nanumiya for about 3 to 4 minutes. He had stated that patient was able to speak at the time of admission and while giving history, he had stated that he was wound by Dharia blows. According to him, looking to

the dimension of the injuries, the weapon used must have been heavy and if the weapon was not heavy, it must have been used with great force. He cannot say that the injuries were curable or whether they were or not in the ordinary course of nature sufficient to cause death.

15. The Post-mortem examination of Nanumiya was done by Dr. Rajnikant Modi, who has deposed at Ex.14 about the injuries which he found both externally and internally on Nanumiya. He has proved the Post-mortem report at Ex.15. The external injuries which were noticed by him are stated against column No. 17 of the Post-mortem notes and they read as under:-

1. Bruise present in front of left shoulder 3" x 1/2" vertical.
2. Cut wound over anterior lateral aspect of left forearm on upper 1/2 level 8" x 4" size, bone deep forming; flap and muscles were clean cut and sectional tissues are retraded, wound extending upwards 7cm, laterally deeper at its upper end.
3. Cut wound in front of right knee dividing both condyle of right femur bone vertically in coronal plain. The plain is directing upwards slightly backwards medial size 3" x 5".
4. CLW 2" x 1/2" size bone deep on outer aspect middle of right arm transverse.

The internal injuries which were noted were:

1. Fracture of ulna and radius on left side upper 1/3 level;
2. Fracture upper end of tibia and fibula;
3. Fracture shaft of humerus on middle 1/3 level on rt. side

It is noted that all these injuries were ante-mortem in nature. The cause of death is given as due to shock as a result of external haemorrhage following multiple injuries.

16. Dr. Modi has in his deposition stated that injuries Nos. 2 and 3 were fatal injuries. According to him, shock as a result of external haemorrhage following multiple injuries has caused the death of Nanumiya. He has denied the suggestion that Nanumiya would have

survived if other medical treatment was given to him. He denied the suggestion that injury No.4 was not sufficient to cause death in the ordinary course of nature.

17. It would be noticed that all the incised wounds which according to the medical evidence could have been caused by a sharp cutting weapon, were deep wounds and some of them were cutting the bone. The nature of the wounds clearly indicates that the blows with sharp cutting weapons must have been given with great force to Nanumiya, which resulted in the deep cut wounds. These deep cut wounds on both the arms and leg of Nanumiya would have obviously resulted in severe haemorrhage causing shock and death of Nanumiya. We are satisfied from the medical evidence of Dr. Modi and from the nature of injuries which were inflicted to Nanumiya that the injuries caused to him by Dharias were sufficient in ordinary course of nature to cause his death. We do not contribute to the reasoning of the learned Additional Sessions Judge that because the injuries were on non-vital parts of the body namely - arms and leg, they were not injuries which may in the ordinary course of nature likely to cause death. We may only note that under Explanation 2 to Section 299 of the IPC whether death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and treatment, the death might have been prevented. In the instant case, we have in fact the deposition of Dr. Modi in which he denied the suggestion that the patient would have survived by medical treatment and maintains that the injuries Nos. 2 and 3 were fatal injuries. The shock and haemorrhage resulting from these Dharia blows was the cause of death of Nanumiya and in our view, these injuries were sufficient in the ordinary course of nature to cause death.

18. The complainant Kasammiya, brother of the deceased in his deposition Ex.27 has stated that on 17.5.1984 he was returning to his house from the outskirts of village Bhumas from his field and when he reached around 3.30 P.M near "Chotra" (a structure around the tree for rest) of village Finav, Bai Lila gave a shout and therefore, he went there and saw that his brother Nabimiya and Kasammiya were present and hands and leg of his brother Nanumiya was cut and on seeing this, he felt giddy. Thereafter, nanumiya was picked up by them from the place where he was lying and brought under a tree. According to him, his brother Nanumiya had told him that the accused No.1 Iqbal had given a Dharia blow on his leg, the accused No. 2 Fatemiya had given him a

Dharia blow on the hand, the accused No.3 Anwermiya had also given a Dharia blow on his other hand while the accused No.4 Gulamhusein had given a stick blow on his back. He then went to the village for making arrangement for a hand-cart. He has said that he had sent the hand-cart with a boy to the place of incident. He had thereafter given the complaint Ex.28. In his cross-examination, he reiterates that his brother Nanumiya had given the names of these four assailants to him. He has also reiterated that he had seen his brother Nabimiya and Hasammiya when he reached the place of the incident. In his cross-examination he has said that at Mahudha he had gone to lodge the FIR after getting his brother admitted in the hospital. He has stated that he had lodged the complaint in the evening around 5.30 P.M. It was suggested to him that the brother of the accused No.1 had assaulted Nanumiya, but that suggestion was denied by this witness and he stated that the entire village knew the accused No.1 as Iqbal and that accused No.1 was popularly known as Iqbal, whatever may have been his real name. He has frankly admitted in his cross-examination that he had not witnessed the incident himself. The deposition of this witness clearly brings out the fact that his brother Nanumiya who was alive at the time when he reached at the place of the incident disclosed to him the names of all the four assailants and had told him that the accused No.1 had given a Dharia blow on his leg and accused Nos. 2 and 3 had given Dharia blows on his hands and that the accused No.4 had given him a stick blow. His deposition also establishes that his other two brothers Nabimiya and Hasammiya were already at the scene of the offence at the time when he reached. In the complaint Ex.28 filed by him, he had disclosed that he was on asking from Nanumiya told by Nanumiya about the assault committed by these four accused persons whose names were given in the complaint. Therefore, on the most material aspect of Nanumiya having disclosed to him at the earliest point of time the names of the four assailants and the weapons used by them, the complainant is fully corroborated by the statements made in the FIR. Kasammiya cannot be said to be a chance witness and his coming near the scene of offence after the incident cannot be doubted because while returning from his field from the outskirts of village Bhumas, he was required to necessarily pass through this place for going to his house. His conduct of making arrangement for a hand-cart and thereafter proceeding to Mahudha and filing a complaint is a natural conduct of a brother. Mahudha is very near the place of the incident, hardly a few kilometers away. The injured was taken to Mahudha on a hand-cart and was admitted in the Primary Health Centre

there. A slight contradiction is tried to be magnified in context of the complainant proceeding to file the complaint. It is stated in the FIR that after he was informed about the assailants by his brother Nanumiya, he had run down to the village and immediately come to the Police Station to lodge the information, while in the examination-in-chief he has stated that after sending the boy with the hand-cart, he had proceeded to file the complaint. In his cross-examination, he has stated that he had first got his brother Nanumiya admitted in the hospital and then filed the complaint. There is hardly any material contradiction on this aspect. Nanumiya after being injured was taken in the hand-cart to the hospital. The doctor who first examined him at Mahudha has stated that he was brought in a hand-cart. Both the hospital and the Police Station were at Mahudha and it is not as if the hospital was at village Finav. The evidence discloses that for going to Mahudha from the place of the offence, one has to pass through the outskirts of Finav from near the house of deceased Nanumiya. The houses of his brothers are in the same locality. When they reached Mahudha, obviously the immediate concern would be to admit the injured in the hospital for treatment. There could not be much time lag between the brothers who were taking Nanumiya to Mahudha in reaching the Mahudha Primary Health Centre and also reaching the Police Station. Mahudha is a small village and it is quite likely that medical aid would not be given in such a case of assault unless a police yadi was there. Reference of Police yadi in the medical certificate and the deposition of Dr.Sharma having been received at 4.30 P.M would only indicate that effort was made to see that immediate treatment was given to the injured in the hospital. In the P.S.I's deposition Ex.51 he has stated that he had recorded the complaint Ex.28 and thereafter, he proceeded to the hospital where he recorded the statement of Nanumiya. Thus, the investigating officer had proceeded for investigation only after the FIR Ex.28 was lodged. Therefore, much importance cannot be attached to this slight discrepancy in the deposition of Kasamiya and the complaint, on the question of Kasammiya going to the Police Station straight or first getting his brother admitted in the hospital and then proceeding to the Police Station, after they reached Mahudha.

19. Nabimiya, brother of deceased Nanumiya in his deposition Ex.26 has stated that while he was proceeding on the day of the incident around 3.30 P.M from his house to the field, he had seen that these four accused were

assaulting Nanumiya. The accused No.1, 2 and 3 were having Dharia and the accused No.4 was having stick. He has stated that Nanumiya was the youngest of nine brothers and he was at the relevant time coming on a horse. Nanumiya had slight defect in his leg and therefore, he used to move on a horse. This witness has stated that as a result of the assault, Nanumiya had fallen down. When he reached the spot, all these accused ran away. He has stated that he had seen from the 'Chotra' that these accused persons were assaulting Nanumiya. He has stated that the accused No.1 was known by the village people as Iqbal. He has denied that Iqbal is the name of the brother of the accused No.1. He has stated that the land of the accused No.1 and his land are in the outskirts of village Bhumas. It is clear that this witness knew the accused No.1, who was being tried, and, there is no scope for any mistaken identity. They were having their fields in the same area and this witness has clearly identified the accused No.1 as one of the assailants and a person who was known as Iqbal. He has stated that he told his brother Kasammiya to get the hand-cart and after the hand-cart was brought, Nanumiya was placed in it and taken to Mahudha hospital. He has stated that Kasammiya had filed the complaint. He is consistent in his version and there is absolutely no ground for discarding his evidence. His evidence clearly shows that accused Nos. 1, 2 and 3 had attacked Nanumiya with Dharias while the accused No.4 had attacked him with a stick and that as a result of the assault, Nanumiya fell down and had to be carried to the hospital at Mahudha. He has also stated that Nanumiya was in his senses when he was taken in hand-cart to Mahudha hospital.

20. Hasammiya in his deposition Ex.29 has stated that he knows these accused persons and there were land disputes between them. He has stated that around 3 to 3.30 PM on the date of the incident, he was doing his duty as a Watchman of the fields and when he came near the Chotra, he had seen the accused Nos. 1, 2 and 3 attacking his brother Nanumiya with Dharias and the accused No.4 with a stick. The injured was thereafter placed under a tree. He had stated that when he had heard a shout, he was coming from one direction while his brother Nabimiya was coming from the other direction and that his brother Nabimiya had also seen the incident. He has stated that when he reached the place of incident, his brother Nabimiya and Kasammiya had reached there. As regards Kasammiya, he is committing an obvious mistake because according to Kasammiya, he had come later and not seen the incident and that when he had come there, his

brother Nabimiya and Kasammiya were already there. This witness has denied the suggestion that Kasammiya reached the place of the incident before he had reached there and that Kasammiya gone away. He had stated that Kasammiya had gone to arrange for hand-cart which was brought by a labourer and thereafter, they had placed Nanumiya in the hand-cart and all of them had gone together. He has denied the suggestion that Kasammiya had straight away gone to the Police Station. He has stated that all his brothers were cultivating the lands jointly. It has come in evidence that their lands are in the outskirts of village Bhumas, from where Kasammiya was returning for going to his house and when he had come to the place of the incident, a Bhil lady had given a shout and he saw Nanumiya lying injured and his brother Nabimiya and Hasammiya there. On all the material particulars about the attack by the accused persons on Nanumiya with leathal weapons like Dharias and stick this witness supports the prosecution version. Except some minor inconsistencies, there is nothing brought out in his cross-examination which would make his version doubtful. There is no suggestion made to this witness who has stated that he knew the accused persons, that the accused No.1 was not known as Iqbal or that he was some different person known as Altaf.

21. The widow of the deceased, Sayidabibi, in her deposition Ex.30 has also stated that she knows the accused persons and that on coming to know that her husband was injured, she proceeded towards the place of the incident and on her way, she saw that he was being brought in a hand-cart. She has stated that her husband told her that he was beaten by these accused persons. He told her that accused No.1 Iqbal had given him a Dharia blow and that the accused Nos. 2, 3 and 4 had also beaten him. She has also stated that his hands and leg were cut and that he was taken to the Government hospital at Mahudha in the hand-cart and thereafter, he died in the Ahmedabad Civil Hospital. In the cross-examination she has stated that for going to the hospital and Police Station at Mahudha, one had to pass from near her house while coming from the outskirts of Finav. She has stated that her brother-in-law Hasammiya had come to take the hand-cart around 2'0 Clock. From this it was urged that this witness could not be relied upon as her version about the time of the incident was quite different. This rustic lady could not be expected to have sense of giving exact time and it is obvious that she had given the time approximately. She was proceeding to the place of the incident when Kasammiya and others were bring Nanumiya in the hand-cart and her statement that Hasammiya had come

to take the hand-cart is not a material discrepancy in the prosecution version in view of the other positive evidence showing that Kasammiya had after coming to the place of the incident gone to arrange for the hand-cart. There is no reason to discard her testimony on the question that she was informed by her husband that all these four accused persons had assaulted him.

22. Mirsaba P.W 10 who was deposed at Ex.31 was not there at the time of the incident and is not an eye-witness. He only states that he had stopped the tempo driver near Rampura village on the Road when Nanumiya was being taken to Ahmedabad Hospital. He had seen that his brother was injured and he had asked him as to what had happened and was told that these four accused persons had beaten him. This witness was staying at Ahmedabad and he had gone to village Rampur for his work. He has explained the nature of the work which he had done in the godown at Rampur. His evidence is relevant only on the aspect that Nanumiya had told him that these four accused persons had beaten; but, we have more positive and reliable evidence on record, of the eye-witnesses as noted above.

23. From the oral evidence of the eye-witnesses and the oral dying declarations made to the witnesses, we are satisfied that the accused Nos. 1, 2, 3 and 4 were waiting for Nanumiya to come and at that time the accused Nos. 1, 2 and 3 were armed with Dharias and the accused No.4 was armed with a stick and when Nanumiya came on his horse, they stopped him and attacked him causing fatal injuries with Dharias, which resulted in his death. After the incident, on seeing the brothers of Nanumiya coming, these accused persons ran away from the place of the offence. It is also established that the assault was made due to previous enmity because though the Revenue Tribunal had given a decision in favour of the accused No.2, there was still a dispute regarding the possession of the land in question.

24. The positive evidence on record clearly shows that the accused No.1 was known as Iqbal, and, this is not a case where there is any scope of mistaken identity of the accused No.1. Witness Hasammiya and Kasammiya knew the accused No.1 very well because their fields were adjoining each other. They had pointed out the accused No.1 in the Court and said that he was the person popularly known as Iqbal. The other witnesses who knew these accused persons including the accused No.1 have also referred to the accused No.1 as Iqbal without any

challenge in the cross-examination. In fact, in their cross-examination, it is not even put to them that the accused No.1 was not Iqbal and that he was someone else. While this judgement was being dictated, the learned Counsel for the accused No.1 drew our attention to copy of a School leaving certificate issued in the name of Iqbal Hussain Gulam Mohammed Malek annexed with the written defence Ex.59. He also drew our attention to one xerox copy of a School Leaving Certificate in the name of Altaf Hussain Gulam Mohammed Malek, in which the birth-date was shown as 1.1.1950. In the certificate which is in the name of Iqbal it is shown as 1.6.1954. On the strength of these certificates it is contended that these two were different persons. We may only point out that after the written defence Ex.59 was given alongwith the xerox copies of the documents, a pursis was filed on 12.12.1984 which is on the record, which contains the list of some original documents of which xerox copies were produced with the written defence Ex.59. It will be noted from that list that no original school leaving certificate was produced with that list. We are therefore, not inclined to attach any weight to the copies of the School Leaving Certificates annexed with the written defence Ex.59. In any view of the matter, having regard to the positive evidence of several witnesses who knew the accused No.1 personally that he was known as Iqbal and that he was the person who had participated in the assault, which was committed on Nanumiya, we have absolutely no doubt in our mind that accused No.1 who was known as Iqbal was the person who was one of the assailants.

25. It is in the context of the above positive evidence that the dying declaration assumes great significance. The dying declaration Ex.52 was recorded in presence of Dr.Sharma. Dr.Sharma has in terms stated that Nanumiya was in his senses at the time when his statement Ex.52 was recorded. He has stated that he put his endorsement on the dying declaration. The contention that the dying declaration was in effect a statement before the Police and was hit by the provisions of Section 162(1) is devoid of any substance because Section 162(2) itself provides that 'Nothing in this Section shall be deemed to apply to any statement falling within the provisions of Cl. (1) of Sec. 32 of the Indian Evidence Act. Therefore, a dying declaration cannot be hit by the provisions of Section 162(1) even if it is made in presence of a Police Officer. As held by the Supreme Court in Ramavati - AIR 1983 S.C 164, there is no requirement of law that dying declaration must necessarily be made to a Magistrate. What evidential

value or weight has to be attached to such statement must necessarily depend on the facts and circumstances of each case. In that case the dying declaration was recorded by the Assistant Inspector of Police and it was held that the dying declaration was admissible and can be relied upon for the purpose of convicting the accused. In the present case it is not as if that the dying declaration was recorded only in the presence of the Police Officer. The Police Officer had, after recording the FIR proceeded to the nearby hospital where he recorded the dying declaration of Nanumiya. The offence which was registered initially was one under Section 307 of the IPC, but later, the charge was converted into one under Sec.302 of the IPC. Therefore, it is obvious that looking to the injuries which were inflicted on Nanumiya, the Police Officer thought it proper to record his statement in presence of the doctor and also take the endorsement of the doctor below that statement. The contention that Nanumiya could not have raised his hand for putting thumb mark has absolutely no substance, because, even where a person is seriously injured in his arm, by holding the thumb against the paper, his thumb impression can be easily taken. There is absolutely no reason to infer that the dying declaration Ex.52 was concocted at a later point of time. The injured was referred to the Ahmedabad Civil Hospital and had died in Ahmedabad. Therefore, at Mahudha there was no reason to concoct a document of this nature. Even if it was intended to be a Police statement, it turns out to be a dying declaration because the person who gave the statement has died and Section 162(1) cannot be applied in view of the provisions of Section 162(2) of the Criminal Procedure Code.

26. This is not a case where the prosecution rests only on the dying declaration. As held above, the positive evidence of eye-witness on its own clearly establishes the guilt of all these accused persons and they are now amply corroborated by the dying declaration which also gives the names of all the four accused persons. Though initially it is stated that all the four accused persons were having Dharias, later on it is stated that the accused No.4 had given a stick blow to him, but, that is only a minor discrepancy and the entire dying declaration cannot be discarded on this ground.

27. Apart from the above dying declaration, there is also reference to these four accused persons having attacked Nanumiya, in the panchnama Ex.44. That Panchnama was essentially drawn for the purposes of recording the condition of the injured and it clearly

noted down the injuries which were found on the person of Nanumiya. There were six injuries noticed at the time when the panchnama was made at Mahudha hospital including a contusion. The contusion is also referred to in the post-mortem note as a bruise at injury No.1. That injury could be caused by a hard and blunt substance. All other incised wounds found on the body of Nanumiya were caused by Dharias. The panchnama Ex.44, after noting down the injuries, proceeds to record that Nanumiya had stated before the panchas that Iqbal, Fatehkhan and Anwarmiya had given the dharia blows to him and Gulamnabi had given stick blows to him. This panchnama Ex.44 was exhibited in view of the endorsement made by the learned Counsel for these accused persons on the list Ex.2 under which 12 documents enumerated therein were produced, and, amongst the documents which were admitted, the said panchnama which appeared at serial No.1 was also admitted and was therefore, exhibited. This aspect is also referred to by the learned Sessions Judge in paragraph 18 of his judgement. Therefore, panchnama Ex.44 was exhibited because its genuineness was not challenged. In view of the endorsement made by the Counsel for the accused persons on the list under which it was produced, the panchnama was rightly exhibited, under the provisions of Sec. 294(3) of the Criminal Procedure Code, in which it is provided that where genuineness of any document is not disputed, such document may be read in evidence in any enquiry, trial or in any other proceedings in the Court without proof of the signature of the person by whom it purports to be signed, provided that the Court may in its discretion require such signatures to be proved. The learned Counsel appearing for the accused persons placed heavy reliance on the decision in Kalu Raghav & anr. Vs. State of Gujarat, reported in XVII GLR 988, in which it was observed that in all cases involving injuries and particularly fatal injuries, the persons incharge of the prosecution or the defence would not tinker with the problem and leave the Court to decide the important questions by resorting to only surmises or conjectures on a technical subject like medical science. It was observed that in the case on hand the learned advocates, who were defending the accused also were remiss in their duties when they adopted the short cut method and agreed to get the certificates of injuries and post-mortem notes admitted into evidence forthwith without exploring the pros and cons of the medical evidence. In that context, the Court observed as under:-

"What we have observed with respect to medical evidence, would apply to such important evidence like the panchnama of the scene of offence also

and such panchnamas and the evidence of the panch would have a material bearing in some cases particularly like the one before us".

Reliance on the decision of this Court in *Kalu Raghav Vs. State of Gujarat* (supra) for a proposition that eventhough genuineness of a document is not disputed and the Counsel for the accused admits the documents, it should not be read in evidence is wholly misconceived. No such proposition is laid down by the said decision. On the contrary, the portion which is ordered to be reported, clearly refers to the fact that under Section 294, a provision has been inserted for the avoidance of unnecessary delay that where any document is filed before any Court by the prosecution or the accused, the contents thereof may be admitted by the other side and if such documents are admitted, genuineness of such documents thereafter cannot be called in question. The only caution which is given by the Court is against abuse of this salutary provision. Therefore, whenever the Court notices that this provision is being abused, the Court will have power, in view of the proviso to Section 294(3), to require the signature and other contents to be proved. Any other view, of the extreme suggested on behalf of the learned Counsel for the accused persons, would fly in the face of the statutory provisions contained under Section 293(3). The apprehension of the learned Counsel of the accused against the damaging part contained in the panchnama is not well founded. It is one thing to say that a document is genuine and can be read in evidence and it is quite a different thing to say as to what probative value such a document has. A document admitted in evidence has different implications. It is one thing to speak of any piece of evidence as substantive or corroborative in terms of its probative value and quite a different thing to speak of it being no evidence for want of proof of its authenticity. These are altogether different rules of Evidence, which have different incidences. Authenticity of a document which is determinative of its reception in evidence is, in our opinion, altogether a different factor unconnected with its probative value and its being corroborative or substantive piece of evidence. The probative value of any documentary evidence may have no direct relevance to the direct reception thereof in evidence. No document with all its probative value can be received in evidence unless its authenticity is first established by the mode of proof of documentary evidence provided in Section 67 to 71 of the Evidence Act. Section 294 of the Criminal Procedure Code has been purposefully introduced to facilitate waiver of formal proof of a document in

criminal cases. Therefore, even though a document which is admitted as genuine and is exhibited in a trial in view of the endorsement made by the Counsel for the accused under Section 294 of the Code, its evidenciary value has to be decided in context of the facts and circumstances of the case. It would therefore be open for the accused persons to assail the contents of the documents, because admission of the document as a genuine document would not amount to admitting the facts stated therein and the acceptance of facts stated in such a document would depend on whether it should be treated as a substantive piece of evidence or a corroborative piece of evidence. We are not relying on that portion contained in the panchnama Ex.44 which is a dying declaration, as a substantive piece of evidence. As noted above, there is ample direct positive evidence showing involvement of all these four accused persons. The oral evidence itself is sufficient to hold them guilty. That is amply corroborated by the documentary evidence in form of dying declarations though of course the dying declaration alone can be relied upon as a substantive piece of evidence. The statement in the panchnama only lends further corroboration to that what is already established by other reliable evidence.

28. Under the above circumstances, on totality of the established facts and circumstances of the case, we are fully satisfied that all these four accused persons had gone together fully armed at the place of the incident, waiting for Nanumiya to come and when Nanumiya came there on a horse back, they assaulted him with their weapons causing severe injuries, which resulted in his death. They, after jointly committing the assault, went away together. The manner in which they waited and inflicted these serious injuries on Nanumiya and having accomplished their task went away together, clearly shows that they were acting in furtherance of their common intention to cause death of Nanumiya. The non-mention of contusion by the doctor at Mahudha or by Mr.Shah who had examined the injured when he was alive, is hardly of any consequence because when all the four accused assaulted Nanumiya with their weapons causing severe injuries, even if accused No.4 did not inflict any blow with the stick, he would have been held guilty for the offence because he was in the company of all other accused persons and it is evident that he was having a stick in his hands. The panchnama Ex.44 shows that there was a bruise mark. We are not inclined to accept the suggestion made by the learned Counsel that the bruise must have been caused to Nanumiya while he was being shifted to the hospital. From the positive evidence on record, we are of the view

that even the accused No.4 had participated in the crime with the stick and he had inflicted the stick blow and that he too shared the common intention to cause the death of Nanumiya. Under these circumstances all the accused were guilty of murdering Nanumiya in furtherance of their common intention. The contention raised on behalf of the accused persons cannot therefore be accepted.

29. The accused No. 2 Yasinmiya Pathan had passed away during the pendency of this appeal and therefore, the appeal against him abates. Rest of the three accused namely accused No.1 - Iqbal alias Altafhussain Gulamhussain Malek, accused No. 3 Anvamiya Nathumiya Malek and accused No.4 Gulamhussain Ahmedmiya Malek are in our opinion guilty of the offence punishable under Section 302 read with Section 34 of the IPC. We therefore convict them for the offence under Section 302 read with Section 34 of the IPC.

30. As this Court has no option but to impose the minimum penalty of life imprisonment, there is no question of giving any hearing to the accused persons, because, we are not going to award any death sentence. We therefore pass the following order:-

ORDER

1. Criminal Appeal No. 345 of 1985 abates against the accused No.2 - Fatemiya Yasinmiya Pathan. This Acquittal Appeal is allowed and the acquittal of the accused Nos. 1 - Iqbal alias Altafhussain Gulamhussain Malek, accused No. 3 - Anvamiya Nathumiya Malek and accused No.4 - Gulamhussain Ahmedmiya Malek for the offence under Section 302 read with Section 34 of the Indian Penal Code is set aside and each one of them is convicted for the offence under Section 302, read with Section 34 of the IPC and sentenced to undergo imprisonment for life. The bail bonds of accused Nos. 1, 3 and 4 are cancelled and it is directed that the accused No. 1 - Iqbal alias Altafhussain Gulamhussain Malek, accused No. 3 - Anvamiya Nathumiya Malek, and accused No.4 - Gulamhussain Ahmedmiya Malek, all should be taken in custody forthwith for serving the sentence.

2. Criminal Appeal No. 346/85 abates against the accused No.2 and no orders are required to be passed as regards the accused No.4 in view of the decision and order made in Criminal Appeal No. 345/85.

3. Criminal Appeal No. 29/85 is dismissed.

(R.K.Abichandani,J.) (R.R.Jain,.J.)